

GAO

Testimony

Before the Subcommittee on Oversight
and Investigations, Committee on Foreign
Affairs, House of Representatives

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OFFICE OF SCIENCE AND
TECHNOLOGY POLICY

Violation of the
Antideficiency Act

Statement of Thomas H. Armstrong,
Managing Associate General Counsel
Office of General Counsel

U.S. Government Accountability Office

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ACCOUNTABILITY ★ INTEGRITY ★ RELIABILITY

Chairman Rohrabacher, Ranking Member Carnahan, and Members of the Subcommittee:

I am GAO's Managing Associate General Counsel responsible for GAO's appropriations law decisions and opinions. I am pleased to be here today to discuss our October 11 opinion concerning the Office of Science and Technology Policy's (OSTP) use of appropriations for bilateral activities with the government of the People's Republic of China.¹ A copy of the opinion can be found in the appendix to this statement.

In the opinion, we determined that OSTP violated a statutory provision prohibiting the agency from using its appropriations for bilateral engagements with China or any Chinese-owned company. Because no funds were available for such purpose, OSTP's actions also violated the Antideficiency Act, a fiscal statute central to Congress's constitutional power of the purse.

As you may know, GAO provides legal decisions and opinions to Congress, its committees and Members, and federal agency officials.² This function is different from GAO's more widely-known audits and investigations.³ In addition to GAO audits and investigations, Congress authorizes the Comptroller General to settle the accounts of the United States.⁴ Our authority to issue appropriations law decisions and opinions is drawn from this authority and a statutory direction to issue decisions upon the request of certain federal officials in advance of a payment of appropriated funds.⁵ Our opinions are informed by facts and views that we solicit from the agency whose appropriation is at issue in the opinion.

¹B-321982, Oct. 11, 2011. *Reprinted in Appendix I.*

²GAO, *Principles of Federal Appropriations Law*, Vol. I, 3rd ed., ch. 1, § C.2, [GAO-04-261SP](#) (Washington, D.C.: Jan. 2004). GAO, *Procedures and Practices for Legal Decisions and Opinions*, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html.

³See 31 U.S.C. § 712. Congress provides GAO with general authority to investigate the receipt, disbursement, and use of public funds, as well as other, more specific audit authorities. *Id.*

⁴31 U.S.C. § 3526.

⁵31 U.S.C. §§ 3527–3529. GAO is authorized to provide advance decisions to the heads of agencies and agency components, as well as accountable officers.

All of our opinions are publicly available on our Web site, www.gao.gov/legal.

In this instance, we received a request for an opinion from the Chairman of the Subcommittee on Commerce, Justice, Science, and Related Agencies, House Committee on Appropriations. The Chairman expressed concern about OSTP's participation in meetings with representatives of the Chinese government. He asked GAO whether OSTP's use of its appropriation to participate in the meetings violated a prohibition enacted in the Full-Year Continuing Appropriations Act, 2011. The Act prohibited OSTP and the National Aeronautics and Space Administration (NASA) from engaging in bilateral activities with China.

The Full-Year Continuing Appropriations Act was enacted on April 15, 2011.⁶ The specific prohibition at issue states as follows:

"None of the funds made available by this division may be used for the National Aeronautics and Space Administration or the Office of Science and Technology Policy to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division."⁷

OSTP advised us that between May 6 and 10, 2011, after the enactment of this provision, OSTP led and participated in a series of meetings with Chinese officials as part of the U.S.-China Dialogue on Innovation Policy (Innovation Dialogue) and the U.S.-China Strategic and Economic Dialogue held in Washington, D.C. During the Innovation Dialogue, the OSTP Director met with the Chinese Minister of Science and Technology to discuss, among other things, Chinese procurement and intellectual property policies. The Director opened and closed the Innovation Dialogue and served on discussion panels. OSTP staff helped the Director prepare for and participate in the meetings. The Strategic and Economic Dialogue was convened by the Department of the Treasury and the State Department. The Director spoke many times during various sessions, including on U.S.-China cooperation on climate science. OSTP

⁶Pub. L. No. 112-10, div. B, 125 Stat. 38 (Apr. 15, 2011).

⁷*Id.*, title III, § 1340, 125 Stat. at 123.

also hosted a dinner to honor Chinese dignitaries. OSTP calculated that, in total, it incurred costs of \$3,500 to participate in these events.

We concluded that OSTP violated the appropriations restriction. The plain meaning of the prohibition is clear. It prevents OSTP's use of funds to participate, collaborate, or coordinate bilaterally in any way with China or Chinese-owned companies. Here, the Director and OSTP staff had direct, substantive involvement in the Innovation Dialogue and the Strategic and Economic Dialogue; OSTP also hosted a dinner for Chinese government officials.

OSTP did not deny that it engaged in prohibited activities. OSTP asserted that the prohibition, as applied to these activities, is an unconstitutional infringement on the Executive's constitutional prerogatives in foreign affairs. As we stated in our opinion, we did not opine on the constitutionality of the prohibition. It is not GAO's role nor within our province to opine upon or adjudicate the constitutionality of duly enacted legislation; that role is properly reserved for the courts. Legislation such as this, which was passed by Congress and signed by the President, is entitled to a heavy presumption in favor of constitutionality. Therefore, absent a judicial opinion from a federal court of jurisdiction that a particular provision is unconstitutional, we apply laws as written to the facts presented.

By using its appropriated funds in violation of the prohibition, OSTP also violated the Antideficiency Act. The Antideficiency Act is one of the major fiscal laws by which Congress enforces its constitutional control of the public purse. The Antideficiency Act is a funds control statute designed to implement agency fiscal discipline. Under the Act, an officer or employee of the U.S. Government may not make or authorize an obligation⁸ or expenditure exceeding the amount of an available appropriation.⁹ The legal effect of the OSTP prohibition is to make no funds available to OSTP for bilateral activities with China or any Chinese-owned company.

⁸In federal fiscal law, an obligation is a "definite commitment that creates a legal liability of the government for the payment of goods [or] services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of [another] party beyond the control of the United States." GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: Sept. 2005), at 70.

⁹31 U.S.C. § 1341.

By spending funds on the Innovation Dialogue, the Strategic and Economic Dialogue, and the dinner to host Chinese dignitaries, OSTP spent funds in excess of those available, therefore violating the Antideficiency Act. Executive agencies must report Antideficiency Act violations to the President and Congress, and transmit copies of their reports to GAO.¹⁰ The Office of Management and Budget provides guidance to executive agencies on reporting violations.¹¹

If you or your staff have any questions about this testimony, please contact me at (202) 512-8257 or armstrongt@gao.gov. Contact points for our Office of Congressional Relations and Office of Public Affairs may be found on the last page of this statement. Julia Matta, Assistant General Counsel, and Faisal Amin, Senior Attorney, made key contributions to this statement.

Thank you, Mr. Chairman. This concludes my prepared statement. I would be happy to answer any questions that you or other members of the Subcommittee have at this time.

¹⁰31 U.S.C. § 1351.

¹¹OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc (last visited Oct. 25, 2011).

Appendix I: GAO Opinion to the Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies



United States Government Accountability Office
Washington, DC 20548

B-321982

October 11, 2011

The Honorable Frank R. Wolf
Chairman, Subcommittee on Commerce
Justice, Science, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *Office of Science and Technology Policy—Bilateral Activities with China*

This responds to your request for our opinion on the propriety of activities undertaken in May 2011 by the Office of Science and Technology Policy (OSTP) with representatives of the government of the People's Republic of China. Letter from Representative Wolf to the Comptroller General (May 11, 2011) (Request Letter). Specifically, you point to meetings with Chinese representatives during the U.S.-China Dialogue on Innovation Policy (Innovation Dialogue) and the U.S.-China Strategic and Economic Dialogue (S&ED) held in Washington, D.C., in May 2011. You ask whether OSTP violated section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act, 2011. Section 1340 prohibits the use of OSTP appropriations for bilateral activities between OSTP and China, or Chinese-owned companies, unless specifically authorized by laws enacted after the date of the appropriations act. Pub. L. No. 112-10, div. B, title III, 125 Stat. 38, 123 (Apr. 15, 2011).

As explained below, we conclude that OSTP's use of appropriations to fund its participation in the Innovation Dialogue and the S&ED violated the prohibition in section 1340. In addition, because section 1340 prohibited the use of OSTP's appropriations for this purpose, OSTP's involvement in the Innovation Dialogue and the S&ED resulted in obligations in excess of appropriated funds available to OSTP; as such, OSTP violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).

Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this case, OSTP provided us with its legal views and relevant supporting materials. Letter from General Counsel, OSTP to Assistant General Counsel, GAO, *Re: B-321982, Office of Science and Technology Policy – Bilateral Activities with China* (June 23, 2011) (OSTP Response). We also

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spoke by telephone with OSTP's General Counsel to ask questions about OSTP's June letter. Telephone Conversation with General Counsel, OSTP (Aug. 4, 2011) (August Conversation). See also Letter from General Counsel, OSTP to Senior Attorney, GAO, *Re: Follow-up to August 4, 2011, Telephone Call* (Aug. 29, 2011) (OSTP August Letter).

BACKGROUND

The Presidential Science and Technology Advisory Organization Act of 1976¹ established OSTP to "serve as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government." 42 U.S.C. § 6614(a). Part of the agency's mission is to "advise the President of scientific and technological considerations involved in areas of national concern including . . . foreign relations. . . ." 42 U.S.C. § 6613(b)(1).

Between May 6 and 10, 2011, OSTP "led and participated in a series of meetings with Chinese officials" as part of the Innovation Dialogue and the S&ED. OSTP Response, at 3. On May 6, 2011, the OSTP Director and Chinese Minister of Science and Technology participated in the Innovation Dialogue. According to OSTP, a goal of the Innovation Dialogue was to "serve as a forum for persuading the rollback of discriminatory, counterproductive Chinese procurement and intellectual property policies. . . ." OSTP Response, at 3. Among the topics discussed were "market access and technology transfer; innovation funding and incentives; standards and intellectual property; and government intervention." OSTP Response, at 4. OSTP informed our office that the OSTP Director opened and closed the Innovation Dialogue and served on discussion panels. OSTP August Letter, at 1. OSTP staff helped the Director prepare for and participate during the meetings. *Id.* See OSTP Response, at 5.

On May 8, 2011, OSTP hosted a dinner to honor Chinese dignitaries. Six U.S. participants attended the dinner, along with an unidentified number of "staff-level employees from other federal agencies." OSTP Response, at 4, n.13. The Director is the only listed dinner attendee from OSTP. There were six Chinese invitees. *Id.*

On May 9 and 10, 2011, OSTP participated in the S&ED. The purpose of the S&ED was to bring together various U.S. and Chinese government officials to "discuss a broad range of issues between the two nations," including on matters regarding trade and economic cooperation. U.S. Department of the Treasury, *U.S. -China Strategic and Economic Dialogue*, available at www.treasury.gov/initiatives/Pages/china.aspx (last visited Oct. 4, 2011). The Secretary of the Treasury and the Secretary of State co-chaired the S&ED along with the Vice Premier and State Councilor of the People's Republic of China. *Id.* Topics of discussion included "enhancement of trade and investment cooperation;

¹ Pub. L. No. 94-282, title II, 90 Stat. 459, 463-68 (May 11, 1976), 42 U.S.C. §§ 6611-6624

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an overview of bilateral relations; military-to-military relationships; cooperation on clean energy, energy security, climate change, and environment; customs cooperation; and energy security.” OSTP Response, at 4. The OSTP Director spoke many times during the various sessions, including on U.S.-China cooperation on climate science. August Conversation. OSTP also had at least one staff member attend the S&ED in addition to the Director. *Id.*

The Full-Year Continuing Appropriations Act, 2011, enacted into law on April 15, 2011, included appropriations for OSTP for fiscal year 2011 in title III of division B. Pub. L. No. 112-10, div. B. Section 1340 of title III provides:

“None of the funds made available by this division may be used for the National Aeronautics and Space Administration or the Office of Science and Technology Policy to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division.”

Pub. L. No. 112-10, § 1340.

OSTP informed us that it incurred costs of approximately \$3,500 to participate in the week’s activities, including the cost of staff time for nine employees preparing for and participating in the discussions, as well as the cost of the dinner OSTP hosted on May 8. OSTP Response, at 5.

DISCUSSION

At issue in this opinion is whether OSTP violated section 1340’s proscription, and, if so, whether the agency violated the Antideficiency Act.

As with any question involving the interpretation of statutes, our analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S.113 (2009). When the language of a statute is “clear and unambiguous on its face, it is the plain meaning of that language that controls.” B-307720, Sept. 27, 2007; B-306975, Feb. 27, 2006; see also *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

The plain meaning of section 1340 is clear. OSTP may not use its appropriations to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned companies. Here, OSTP’s participation in the Innovation Dialogue and S&ED contravened the appropriations restriction. The Director opened the Innovation Dialogue and moderated discussions therein. OSTP staff prepared materials for and attended the discussions. OSTP then invited U.S. and Chinese officials to a dinner that it paid for using its appropriation. Finally, OSTP participated in the S&ED, during which the Director spoke on multiple occasions, including on

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climate science. OSTP did not identify, nor are we aware of, any specific authority to do so that was enacted after the date of the Continuing Appropriations Act, 2011.

OSTP does not deny that it engaged in activities prohibited by section 1340. OSTP Response; August Conversation. OSTP argues, instead, that section 1340, as applied to the events at issue here, is an unconstitutional infringement on the President's constitutional prerogatives in foreign affairs.² OSTP Response, at 1; August Conversation; Letter from Director, OSTP, to the Speaker of the House of Representatives, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011) (OSTP May 16 Letter). OSTP claims that section 1340 is "unconstitutional to the extent its restrictions on OSTP's use of funds would bar the President from employing his chosen agents for the conduct of international diplomacy." OSTP Response, at 1. OSTP asserts that the President has "exclusive constitutional authority to determine the time, place, manner, and content of diplomatic communications and to select the agents who will represent the President in diplomatic interactions with foreign nations." OSTP May 16 Letter. OSTP argues that, for this reason, Congress may not "use its appropriations power to infringe upon the President's exclusive constitutional authority in this area." *Id.*

It is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340. See B-300192, Nov. 13, 2002; see also B-306475, Jan. 30, 2006. In our view, legislation that was passed by Congress and signed by the President, thereby satisfying the Constitution's bicameralism and presentment requirements, is entitled to a heavy presumption in favor of constitutionality. B-302911, Sept. 7, 2004. See *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988). Determining the constitutionality of legislation is a province of the courts. U.S. Const. art. III, § 2. Cf. *Fairbank v. United States*, 181 U.S. 283, 285 (1901). Therefore, absent a judicial opinion from a federal court

² The Department of Justice characterizes section 1340 as a "valid limitation on OSTP's use of appropriated funds only to the extent that its restrictions do not infringe upon the President's exclusive constitutional authority over international diplomacy." Letter from Assistant Attorney General, Office of Legislative Affairs to Representative Wolf (June 28, 2011). Justice advised OSTP that OSTP was "permitted to engage in diplomatic activities with Chinese representatives to the extent that it would be doing so as an agent of the President for diplomacy with China, notwithstanding Section 1340." *Id.* See Memorandum Opinion for the General Counsel, OSTP, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, OLC Opinion, Sept. 19, 2011, available at www.justice.gov/olc/memoranda-opinions.html (last visited Oct. 4, 2011). OSTP asserts that the U.S.-China Agreement on Cooperation in Science and Technology designates OSTP as the executive branch authority charged with "collaboration and coordination with China in support of U.S.-China science and technology policy cooperation." OSTP Response, at 3.

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of jurisdiction that a particular provision is unconstitutional, we apply laws as written to the facts presented. See B-114578, Nov. 9, 1973. In 1955, for example, we stated that we "accord full effect to the clear meaning of an enactment by the Congress so long as it remains unchanged by legislative action and unimpaired by judicial determination." B-124985, Aug. 17, 1955. We see no reason to deviate here. Indeed, we are unaware of any court that has had occasion to review the provision, let alone adjudicate its constitutionality, nor did OSTP advise of any judicial determination or ongoing litigation.

As a consequence of using its appropriations in violation of section 1340, OSTP violated the Antideficiency Act. Under the Antideficiency Act, an officer or employee of the U.S. Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation. 31 U.S.C. § 1341. See B-300192, Nov. 13, 2002. If Congress specifically prohibits a particular use of appropriated funds, any obligation for that purpose is in excess of the amount available. 71 Comp. Gen. 402 (1992); 62 Comp. Gen. 692 (1983); 60 Comp. Gen. 440 (1981). By using its fiscal year 2011 appropriation in a manner specifically prohibited, OSTP violated the Antideficiency Act. Accordingly, OSTP should report the violation as required by the act.³

Sincerely,



Lynn H. Gibson
General Counsel

³ See 31 U.S.C. § 1351. The Office of Management and Budget has published requirements for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars/a11_current_year/a11_toc (last visited Oct. 4, 2011).

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